Supreme Court of the United States.

OCTOBER TERM, 1904.

Number 238.

THE SAVANNAH THUNDERBOLT AND ISLE OF HOPE RAILWAY OF SAVANNAH, GEORGIA,
Plaintiff in Error,

v.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,
Defendant in Error.

Brief of the Plaintiff in Error.

STATEMENT OF CASE.

The Savannah Thunderbolt and Isle of Hope Railway and the City and Suburban Railway are railways operated by electricity in the city of Savannah, Georgia, with lines extending outside of the city to suburban points. The Savannah Thunderbolt and Isle of Hope Railway and the City and Suburban Railway have an aggregate mileage in Chatham County outside of Savannah of 15 miles and an aggregate mileage within the corporate limits of Savannah of 20 miles. Of the latter 1 mile of track is not used (Printed Record, pp. 32 and 33). For the purposes of this case by agreement of the parties both of these railways are considered as the Savannah Thunderbolt and Isle of Hope Railway (Printed Record, p. 47 and 48).

Every year in accordance with law the plaintiff in error returned its property to the Comptroller-General for State,

county and municipal taxes. The taxes were regularly paid. The year 1899 the taxes paid amounted to over $6,000 (Printed Record, pp. 33 and 34).

On November 4, 1897, the city of Savannah and the Savannah Thunderbolt and Isle of Hope Railway entered into a contract for the purpose of requiring the railway to afford "better accommodation and service to the public" (Printed Record, pp. 21 and 22), and "for the benefit of the public" (Printed Record, p. 24, III). This contract was subsequently amended in April, 1898 (Printed Record, pp. 27 and 28). The purpose and intention of this contract was to grant to the plaintiff in error the use of the streets in consideration of the numerous benefits accruing to the public and by the express terms of this contract for the valuable considerations, in land and money, the easement for railway purposes in the streets named therein was "granted" to the railway (Printed Record, p. 28, par. 1). The consideration moving to the city was paid, the contract executed by the plaintiff in error, and the streets in use by the railway and involved in this case are those mentioned in that contract. Under this contract the railways paid to the city of Savannah in land and money over $10,000 (Printed Record, p. 43). By the terms of this contract the railway company conveyed to the city of Savannah certain land in Bolton Street, a street in the city of Savannah, to enable the city of Savannah to open Bolton Street eastwardly and specifically reserved the easement in Bolton Street for its railway purposes (Printed Record, p. 38, par. *d*). Under the same contract a portion of Whitaker Street owned by the railway company was conveyed to the city with the specific reservation of the easement of said railway company to use said street for its railway purposes (Printed Record, p. 39, par. *g*).

On December 28, 1898, the Mayor and Aldermen of the city of Savannah passed a tax ordinance for the pur-

pose of raising revenue for the year 1899. Among other taxes laid in this ordinance was one for $100 for each mile or fraction of a mile of track of railways in the city of Savannah. The ordinance is as follows:

"Street Railroad Companies whether under the control of another company or not shall pay $100 per mile or fraction of a mile of track and in addition thereto $25 for each and every car at any time used by said company in the city * * *" (Printed Record, p. 16.)

On the 22d of March, 1899, the foregoing ordinance was amended as follows:

"An ordinance to amend that part of the tax ordinance passed December 28, 1899, relating to Street Railway Companies, to be found on page 11 of the pamphlet containing the city tax ordinances." "Sec. 1. Be it enacted by the Mayor and Aldermen of the city of Savannah in Council assembled, that for the purpose of expressing more clearly the intent of council, the words on page 11 of the pamphlet containing the above mentioned tax ordinances, 'street railroad companies whether under the control of another company or not, shall pay $100 per mile or fraction of a mile of track,' be and the same are hereby so amended that hereafter they shall read as follows: 'Street railroad companies whether under the control of another company or not, in lieu of the specific taxes heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city, and *for the use of the streets of the city* [italics ours] at the rate of $100 per mile or *fraction of a mile of track* used in the city of Savannah by said railroad company. And it shall be the duty of the street railroad company to make a return under oath through their proper official of the amount of their trackage in the city of Savannah.'" (Printed Record, p. 16.)

As there was one mile of track in the city not in use by the plaintiff in error, the taxes under this amended ordinance amounted to $1,900.

Plaintiff in error refused to pay these taxes, execution was issued and levied upon its cars. Thereupon plaintiff in error filed its petition in the Superior Court of the Eastern Judicial Circuit of Georgia and the judge of that court on the 19th day of August, 1899, granted a temporary restraining order temporarily prohibiting the collection of the taxes (Printed Record, pp. 9, 10 and 11). On October 28, 1899, the defendant in error filed its answer to the rule to show cause (Printed Record, p. 12). On December 11, 1899, defendant in error filed its answer to the petition (Printed Record, pp. 13, 14 and 15). On January 5, 1900, the plaintiff in error filed two amendments to its petition (Printed Record, pp. 16, 17, 18, 19, 20 to 29). By the first amendment it was expressly alleged that the tax ordinance discriminated unjustly against the plaintiff in error "in that they have not imposed this tax upon any other railroad company doing business in the city of Savannah and using the streets of the city" (Printed Record, p. 17). This amendment also sets up the impairment of the obligation of the contract of 1897 (Printed Record, pp. 18 and 19). The second amendment sets up more specifically the impairment of the obligation of this contract and alleged that the ordinance was an attempt to take plaintiff in error's property without due process of law (Printed Record, pages 20 and 21). On February 19, 1900, upon an interlocutory hearing the temporary restraining order was dissolved and the temporary injunction prayed for by the plaintiff in error denied (Printed Record, p. 29). To this rule of the court the plaintiff in error excepted and issued its writ of error to the Supreme Court of Georgia. The case was argued in that court on March 21, 1900, by order of that court reargued on July 17, 1900, and decided November 26, 1900. The decision of the lower court was affirmed. The following is the opinion rendered by the

Supreme Court of the State of Georgia, as reported 112 Georgia, 164:

"*Savannah, Thunderbolt and Isle of Hope Railway* v. *Mayor and Aldermen of Savannah.*

"The municipal authorities of the city of Savannah had power, under the charter of the city and the second proviso of section 2180 of the Civil Code, to levy and collect an occupation or business tax from street railroad companies for the use and occupation of the city streets by their tracks and cars, when such companies' principal business was the transportation of passengers from points within the city limits to other like points.

"The facts of this case differ from those of the case of *City Council of Augusta* v. *Central Railroad*, 78 Ga. 1191.

"Argued March 21, Reargued July 17—Decided November 26, 1900.

"Petition for injunction. Before Judge Falligant. Chatham Superior Court. February 19, 1900.

"Barrow & Barrow and Joseph B. Cumming, for plaintiff.

"Samuel B. Adams, for defendant.

"SIMMONS, C. J. The municipal authorities of the city of Savannah by a proper ordinance, levied a business or privilege tax upon street-railroad companies doing business within the limits of the city. The plaintiff below, being such a company, filed an equitable petition against the municipal authorities, alleging that the city had no power or authority to levy such taxes, and that the same were therefore illegal and void. Upon the hearing the judge refused the injunction, and the petitioner excepted.

"The charter of the city of Savannah contains the following clause: 'They (the municipal authorities) are also hereby vested with full power and authority to make such assessments and lay such taxes on the inhabitants of said city, * * * and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience, and advantage of said city, and may enforce the payment of such assessments and taxes in such manner as said mayor and aldermen may prescribe.' Code of 1882, § 4847.

This is about as broad a power as the English language can express to tax business and occupations. There can be no doubt that the city authorities had the power to impose the tax here complained of, unless the decision in the case of the *City Council of Augusta* v. *Central Railroad*, 78 Ga. 119, rules to the contrary. It is claimed by the plaintiff in error that as street-railroads were, by the act of 1889 (Acts 1889, p. 36), put under the same tax act as steam and commercial railroads, they were brought within the construction put upon the tax act of 1874 in the *Augusta* case. It is claimed that under that case, the municipal authorities had no power to levy or collect an occupation tax upon street-railroad companies; that the charter of the city of Augusta contained substantially the same provisions as to the taxation of occupations as does that of the city of Savannah; and that when this court decided that the municipal authorities of Augusta had no authority to levy a business tax upon the Central Railroad and the other two railroad companies involved in that case, the question was closed so far as concerns the right of the city to impose an occupation tax upon the railroad company. We do not agree with this contention. The opinion in the *Augusta* case, which is the decision of the court, shows that the ruling made applied only to what may be termed a commercial railroad company,—one whose general business is not carried on within the city. The State, by the act of 1874, reserved the exclusive right to collect taxes from railroad companies on the property owned and used in connection with their business, and a city had no authority to impose a tax upon such property. Nor could a city, under the case just cited, impose a business or occupation tax on a railroad company which, under authority of its charter, merely transported freight and passengers to and from the city; for such a tax could be used to work a practical repeal to the charter of the company. Where, however, a street-railroad company does not transport freight or passengers to and from the city as the beginning or end of the route, but engages in transportation from one point within the city to another within the city, it enters into a general business within the city and is properly taxable

by the municipality. And so if a street-railroad company combine the two businesses, as was done by the company in the present case, so as to transport freight or passengers from the city to points beyond or from such points to a point within the city, and also to transport freight or passengers from one part of the city to another, then such company, though it might not be subject to a city tax on its extra-municipal business, may be taxed by the city no the business carried on exclusively within the city limits. This principle was recognized in the *Augusta* case; for it is there stated that "if a railroad company, which is a corporation, should carry on a business in the city of Augusta such as warehouseman, broker, drayage, or commission business, etc., it would be liable to be taxed as any other person carrying on a like business." It is argued that one of the railroad companies declared in the *Augusta* case to be exempt had in this State but one or two miles of track, nearly all of which lay within the city of Augusta. Conceding this to be true, the case is still vastly different from the present one; for the company in question was engaged in transportation to and from Augusta and points in an adjoining State, and did not enter into the business of transporting freight or passengers from any point within Augusta's limits to any other such point.

"In the present case the record discloses that the street-railroad company actually occupies with its cars and tracks the streets of the city of Savannah, and that it transports passengers from point to point within the city and charges toll therefor. It occupies and uses the streets as much as any hack or omnibus line would do—indeed much more. It is well settled that the city has authority to charge these latter companies for the privilege of carrying on their businesses within its limits, and we see no reason why a street-railroad company should be held to stand upon a different footing. It was argued by counsel for plaintiff in error, that while the power given to the city to tax occupations was very broad, it was not universal; that inasmuch as the State itself had never levied a business tax upon railroad companies, it was not the intention, in granting the charter of the city of Savannah,

to give the city authorities power to levy such a tax. In reply to this argument it is sufficient to say that there are a great many businesses and occupations upon which the State has never levied a business tax but which are nevertheless taxable by cities. Thus the State has never levied a business tax upon merchants, blacksmiths, those who run omnibus or hack lines, or those in various other occupations which might be mentioned; yet, under the authority given to municipalities to impose occupation taxes, such taxes have been generally, we might almost say universally, levied upon all businesses within the municipal limits. While the taxation of street-railroad companies may not have been in the mind of the legislature when it granted to the city of Savannah 'full power and authority to make such assessments and lay such taxes on the inhabitants of said city, * * * and those who transact or offer to transact business therein,' the power granted is amply sufficient to cover such taxation. We suppose that when this charter was granted to the city of Savannah, there were no such companies in this country as the present plaintiff in error, but the power given is sufficient to embrace any new business or occupation that might arise in the rapid commercial and business growth of the country. Admitting for the sake of the argument the soundness of the plaintiff's contention as to the force and effect of the *Augusta* case, 78 Ga. 119, we would still hold that under the Act of 1894 (now § 2180 of the Civil Code) the city authorities had power to levy an occupation or privilege tax upon this plaintiff in error. The record discloses that the company was incorporated under the Act just cited. In the act and in the Code Section is a proviso which declares that all street-railroad companies incorporated thereunder 'shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time.' As before remarked, the charter of the city gives it ample power to levy and collect a tax upon the business of street-railroad companies. The tax is therefore within the terms 'assessment and other lawful burdens' imposed upon them. In the case of *Home*

Insurance Company v. *Augusta*, 50 Ga. 530, this court, in discussing a provision of the charter of the city of Augusta which authorized the municipality 'to make such assessments on the inhabitants of Augusta or those who hold taxable property within the same as may seem expedient,' said: What is the meaning of the word 'assessments on the inhabitants'? it certainly authorizes a tax on property. Is it limited to that? If so, why? Businesses, occupations, and professions are as equally the subject of taxation as property, and have been as regularly taxed as any real or personal property. Cooley's Const. Lim. 479. If the assessment is not limited to the person, such as a capitation or poll tax, what is there to confine it to any one subject matter of taxation? It has always been the rule of the legislature of this State to assess a tax on property, on business, and also a capitation tax; and when taxation is referred to, the power to make assessments includes the power to assess all three, unless there be some other provision to limit it. If it does not extend to the power to levy a tax on business, etc., then it would, in this case, be restricted altogether to property. See also, *Wells* v. *Savannah*, 107 Ga. 4; *Mutual Reserve Association* v. *Augusta*, 109 Ga. 73. For these reasons we think that when the legislature extended to street-railroads the method of taxation which had theretofore been applied to commercial railroads, and, at a time subsequent to that of the decision in the *Augusta* case, inserted the above quoted proviso as to liability to assessments and other lawful burdens, this was a modification of that decision, or a refusal to extend it to street-railroads, even if the decision could otherwise be held to embrace them.

"After much reflection and study of this important case, we have come to the conclusion that there was no error in holding that street-railroad companies are liable under the law for the business tax imposed by the city, and that there was no error in refusing the injunction.

"Judgment affirmed. All the Justices concurring."

In rendering this decision the Supreme Court of the State of Georgia completely ignored the Federal questions involved in this case and based their decision solely upon

the State question as to whether or not there was any authority under the laws of Georgia for a municipality to impose a tax on a railroad corporation for doing business within the corporate limits and this was done, although the Federal question was separate and distinct from the State question, and remained in the case in spite of the adverse decision to the contentions of the plaintiff in error upon the State question.

Afterwards, on July 12, 1901, the case came on for final trial, before a jury in the lower court on the same pleadings. The brief of the evidence introduced on this trial is set forth in the printed record, pages 32 to 48. The evidence showed that the Central of Ga. Ry. Co. was using five miles of the streets of the city of Savannah in doing a purely local business within the city (Printed Record, pp. 33, 43 and 45, bottom).

The above decision of the Supreme Court of Georgia decided nothing except that under the laws of Georgia the city of Savannah could impose a tax on railroad corporations when they carried on a business solely within the corporate limits, and left the other questions relative to the illegality of the ordinance to be determined on the final hearing. Under direction from the court the jury found a verdict for the defendant in error, upon which judgment was returned on the same date by the court for the defendant in error (Printed Record, p. 30). On July 19, 1901, the plaintiff in error filed its motion for a new trial in which all of the Federal questions now urged were set forth (Printed Record, pp. 31 and 32). On August 10, 1901, a new trial was refused (Printed Record, p. 48). The plaintiff in error excepted to the judgment refusing to grant the new trial by its bill of exception filed in the lower court August 15, 1901, and in the Supreme Court of the State of Georgia, August 26, 1901 (Printed Record, pp. 6, 7, 8 and 9). The case was sub-

mitted to the Supreme Court of Georgia on March 1, 1902, and its decision rendered April 2, 1902, affirming the judgment of the lower court (Printed Record, pp. 49, 50 and 51). Again the Supreme Court of Georgia ignored the Federal questions involved in the case. On April 1, 1904, the plaintiff in error filed its petition for a writ of error to the Supreme Court of the State of Georgia, which was on that date allowed by the Chief Justice and filed in the office of the clerk of the Supreme Court of Georgia (Printed Record, pp. 1, 2 and 3).

ASSIGNMENT OF ERRORS.

The assignment of errors filed by the plaintiff in error and now urged are as follows:

I.

The court erred in sustaining said tax ordinance for the reason that said tax ordinance is repugnant to the fourteenth amendment of the Constitution of the United States, in that it denies to the plaintiff in error the equal protection of the laws, by being an arbitrary classification by the taxing power and being a discrimination against the said plaintiff, in that it did not apply to other persons similarly situated and using the streets under like conditions.

II.

The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it was void, because it impaired the obligation of the contract between the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, and the mayor and aldermen of the city of Savannah made November 4, 1897, and amended in April and July, 1898, set forth in the record.

III.

The court erred in refusing to hold and decide that the said tax ordinance of the mayor and aldermen of the city of Savannah was an authority exercised under the State of Georgia and was void upon the ground that it was repugnant to that clause of the Constitution of the United States which prohibits any State from impairing the obligation of a contract.

IV.

The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it included Whitaker and Bolton Streets, the land for which had in part been conveyed to the mayor and aldermen by the railway for the purposes of streets, and at the same time the easement for railroad purposes over said land was expressly reserved to the railway, this being done by contract with the mayor and aldermen, the obligation of which contract, the plaintiff contends, the ordinance impairs.

BRIEF.

First Assignment of Error.

"The court erred in sustaining said tax ordinance for the reason that said tax ordinance is repugnant to the fourteenth amendment of the Constitution of the United States, in that it denies to the plaintiff in error the equal protection of the laws, by being an arbitrary classification by the taxing power and being a discrimination against the said plaintiff, in that it did not apply to other persons similarly situated and using the streets under like conditions."

This tax is imposed on the plaintiff in error because it does business in the city of Savannah, and "for the use of the streets of the city" in doing this business. The plaintiff in error's railway is not confined to the city

limits, in which it uses 19 miles of streets, but extends 15 miles outside of the city of Savannah. The Central of Georgia Railway Company, a steam railroad, is engaged in business within the corporate limits of the city of Savannah and in carrying on their business use all of River Street, and portions of Bay Street, St. Julian Street and Randolph Street (Printed Record, page 43). They use a total of 5 miles of the streets of the city of Savannah (Printed Record, page 45). Their lines also extend outside of the city of Savannah. The business carried on by the plaintiff in error and the business carried on by the Central of Ga. R. R. Co. are both local, that is to say both are for transportation from one point within the city limits to another point within the city limits (Printed Record, page 43). Absolutely the only differences between the two are that plaintiff in error operates by electricity and in the business done in the city of Savannah transports freight and passengers while the Central of Ga. R. R. Co. operates by steam and in the business done in the city of Savannah transports freight.

We contend that the difference between these two corporations is not sufficient to justify a classification which puts the electric railway in one class and imposes a burden on it of $1,900 per annum and puts the commercial railway in a separate class and exempts it from any tax. The tax ordinance defines the class on which this burden is to be imposed and shows on the face of it that the tax is imposed not for a particular business done but for a special privilege granted.

This court will recognize the definition of the class as contained in the taxing act and the classification must be justified under such definition.

Magoun v. *Ill. Trust & Savings Bank*, 170 U. S. 283, 296.

Pacific Express Co. v. *Seibert*, 142 U. S. 339.

We contend that it is apparent from the definition of the class to be taxed that such class is not to be determined by any particular business carried on, but is to be determined by the question of whether or not the special privileges are enjoyed. The tax is not imposed for the privilege of doing business of transporting passengers or freight or freight and passengers or for doing any particular kind of business. It is necessary in order to give the taxing power jurisdiction that a local business be done, but whether or not a particular person falls within the class established is determined not by the business done but by the privileges enjoyed. Subjection of the person to the taxing power depends upon his doing business within their jurisdiction. Subjection of such business to the tax depends upon his using the streets in doing such business. In other words, a railroad not doing a local business but using the streets would not be subject to the tax for the reason that the taxing power would have no jurisdiction to impose the tax. And likewise, a railroad doing a local business but not using the streets would not be subject for the reason that it would not enjoy the privileges for which the tax was imposed. But a railroad which does a local business, and thereby subjects itself to the taxing power of the municipality, and in doing this business uses the streets, and thereby enjoys the privileges granted, is subject to this tax. Our Supreme Court in passing on this case has shown clearly that no distinction is to be made between an electric railroad and a commercial railroad if they both do a local business.

See decision in statement of case, *Savannah Thunderbolt and Isle of Hope Ry.* v. *Mayor and Aldermen of the City of Savannah*, 112 Ga. 164; *City Council of Augusta* v. *Central of Ga. R. R.* 78 Ga. 119.

It follows therefore, that the material question to be

considered, in determining whether these two corporations are of the same class, is whether the two corporations doing business in the city use the streets of the city. The burden is imposed for this privilege. Membership in the class is determined by the enjoyment of this privilege. It is for occupying the streets with their tracks that they are required to pay. In other words, they have based their classification not upon the particular business carried on but upon the privileges granted. This appears not only from the express language in the ordinance "for the use of the streets in the city" as well as when they fix the rate of the tax at $100 per mile or fraction of a mile "of track used," but by the failure of the ordinance to define the class as those doing a particular business.

Where the classification is based not upon the kind of business carried on, but upon the special privileges granted, it must appear in order to sustain the classification that the enjoyment of the privileges places the person taxed in a separate and distinct class by reason of such privilege. The taxing power can not base its classification on the privilege granted and impose a burden therefor without going further and seeing to it that no one is omitted from the burden, whatever their business may be or they may be called, who enjoy the same privileges.

Gulf Colorado & Santa Fe Ry. v. *Ellis*, 165 U. S. 150, 157.

Merchants and Manufacturers Bank v. *Pennsylvania*, 167 U. S. 461, 465.

The learned justice rendering the opinion in the case of *Gulf Colorado & Santa Fe Ry.* v. *Ellis* on page 157 in his discussion of this principle, and in reply to the argument that the penalty imposed upon the railroads under certain conditions, as set forth in that case, could be justified upon the ground that special privileges had been

granted the corporations, says: "It is sufficient answer to say that the penalty is not imposed on all corporations. The burden does not go with the privilege; only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored."

He goes further and in answer to the suggestion of possible distinction between corporation privileges or possible classification between corporations as such and says: "Further, the penalty is imposed not upon all corporations charged with the quasi public duty of transportation, but only those charged with a particular form of that duty, so the classification is not based on any idea of special privilege by way of incorporation nor of special privilege given thereby for the purpose of private gain nor even of such privileges granted for the discharge of one general class of public duties." Recognizing the distinction in the nature of the privilege under discussion in that case and the privilege involved in the case at bar, we nevertheless earnestly contend that the principle so clearly illustrated by the decision in that case is most applicable to the case at bar. The taxing power here has imposed a burden on railways coming within their jurisdiction by doing a local business because they use the streets. But when they arbitrarily select electric railways; when they impose it solely on electric railways; when they put electric railways enjoying this privilege in a class to themselves and exempt steam railways enjoying exactly the same privileges, then "the burden does not go with the privilege; only (electric) railroads of all corporations are selected to bear this penalty; the rule of equality is ignored." They have failed to treat all persons "alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

Hayes v. *Missouri*, 120 U. S. 68, 71.
Soon Hung v. *Crowley*, 113 U. S. 703, 709.
Billings v. *Illinois*, 188 U. S. 97.

The contentions of the plaintiff in error in this assignment of error could not be more clearly stated than in the language of Mr. Justice Lamar in the opinion of the court in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339. He says (p. 352):

"The contention of the complainant, however, in this connection is that the rule of uniformity and equality of taxation is destroyed by the arbitrary discrimination involved in the definition of what shall be taxed in the act, imposing upon certain persons or associations a tax from which other persons or companies of precisely the same kind, doing exactly the same kind of business, under exactly the same conditions, are exempt. In other words, the contention is that the act of the legislature arbitrarily defines what shall constitute an express company and then lays a tax upon its business, while at the same time it permits the same kind of business to be done by any person or company not embraced within the class just defined without being subject to any tax at all."

While it is true that in that case the classification was based on the difference in business done and the definition was of a particular business—and in the case at bar our contention is that the business done does not define the class, yet no stronger argument can be used in favor of the contention, now made in the case at bar, of this tax being an unreasonable and arbitrary selection, than the reasons given by the learned justice in sustaining the classification. The act imposed a tax on express companies defined by the act as those carrying on the business of transportation under contracts for hire with railroad or steamboat companies. The act was not enforced against railroad or steamboat companies or other companies which owned their own means of transportation. The court said that there was an essential difference between express companies as defined by the act and other corporations owning their own means of transportation,

and based this determination on the fact that railroad companies owning their own means of transportation were taxed on many kinds of tangible property while the express companies, as defined by the act, had no tangible property subject to taxation. It was said that "this distinction clearly places the express company defined by this act in a separate class from companies owning their own means of transportation." The case is a clear illustration of what is meant by a reasonable difference justifying a classification of corporations.

The same decision recognizes the principle of law that in determining the question as to whether two persons are of the same class for the purpose of taxation, the policy of the taxing power in the treatment of the two persons with regard to other matters is to be considered; whether they are treated alike for the purpose of other taxation and whether they are dealt with by the taxing power in other respects and under other laws as persons of the same class. It is said:

"* * * Such company being so entirely dissimilar in vital respects, as regards the purposes and policy of taxation, from railroad companies and the like, owning a large amount of tangible and other property subject to taxation under other and different laws, and upon other and different principles, we do not see how, * * * it can be held violative of the 14th amendment of the Constitution. * * * "

Id. page 354.

In this connection, we call the court's attention to the policy of the State of Georgia in this respect. The plaintiff in error and the Central of Ga. R. R. Co. are treated by the State of Georgia as persons of the same class absolutely in every respect. They are incorporated under the same law (Civil Code of Ga. 1895, § 2180). They are placed in the same class for the purpose of State taxation and the

same forms and rules with regard to returning their property for State, county and municipal taxation applies alike to both (Ga. Laws, Act of 1889, page 36). They are both regulated by the State Railroad Commission. The same rule of law as to diligence and the law relative to the presumption of negligence applies alike to each. The same law excepting them from the rule of common law with regard to negligence of fellow-servants applies alike to each. They are considered by the State of Georgia as the same persons in every detail of their existence, in every requirement of duty and in every privilege granted and burden imposed.

This court has recognized the principle that in determining whether or not corporations belonged to the same class it is necessary to consider whether they are held by the taxing power as equally responsible and liable in other matters relating to their business.

Missouri Pacific Ry. Co. v. *Mackey*, 127 U. S. 205, 210.

Minneapolis & St. Louis Ry. v. *Beckwith*, 129 U. S. 26–29.

It is respectfully submitted that the ordinance involved in this case is void. While the taxing power has the right to classify they can not do so arbitrarily but must base their classification upon some reasonable ground. By the express terms of this ordinance the class established is defined. The tax is imposed on railroads for the privilege of using the street in doing business within the corporate limits. The fact that one is an electric road and the other a steam road is not such a reasonable difference as would authorize their separate classification and the truth of this has been recognized by the taxing power in dealing with these two persons in every other instance and respect. The fact that the local business of

one is transportation of freight and passengers and the local business of the other is the transportation of freight would not be such a difference in the business engaged in as would authorize placing them in separate classes, even if the taxing ordinance based the classification on a particular business engaged in rather than a privilege granted. We respectfully submit that this tax ordinance can not stand. The two persons, the plaintiff in error and the Central of Ga. R. R. Co. are both common carriers, are both subject to the same laws of our State with regard to the conduct of their general business, are both engaged in practically the same local business in the city of Savannah, and both enjoy the same privileges from the city of Savannah. A tax ordinance which requires the payment of $1,900 from one and nothing from the other is a mere arbitrary selection and can not be justified by calling it classification.

Second and Third Assignments of Error.

"The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it was void, because it impaired the obligation of the contract between the Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, and the mayor and aldermen of the city of Savannah, made November 4th, 1897, and amended in April and July, 1898, set forth in the record."

"The court erred in refusing to hold and decide that the said tax ordinance of the mayor and aldermen of the city of Savannah was an authority exercised under the State of Georgia and was void upon the ground that it was repugnant to that clause of the Constitution of the United States which prohibits any State from impairing the obligation of a contract."

The contract of 1897 as amended is a contract on the part of the city of Savannah that they would grant the use of the streets named therein to the plaintiff in error. We

recognize that as to all of the streets named in that contract there was no express agreement to this effect, except the language used in the last amendment to that contract, to wit: "and the right to lay down, construct, maintain and operate said railway through said streets, as above stated, is granted" (Printed Record, p. 28, par. 1st). Nevertheless we earnestly contend that when the contract is construed as a whole and in view of the large consideration passing from the plaintiff in error, and in view of the circumstances surrounding the parties, and their evident intention as illustrated by the entire contract, that there is a clear and unquestionable implication that the contract bound the city to grant the use of the streets to the plaintiff in error free from any additional burdens.

The prohibition of the Constitution against the impairment of the obligations of contracts applies to implied as well as express contracts

Fisk v. *Jefferson Police Judge*, 116 U. S. 131.
Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98, 112.

This court has frequently decided "that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intentions they have manifested in forming them."

O'Brien v. *Miller*, 168 U. S. 287, 297.
Goddard v. *Foster*, 17 Wallace, 123, 142–143.
Black v. *United States*, 91 U. S. 267, 269.

Where the court from all the circumstances surrounding the contract and the consideration and acts of the parties implies certain stipulations or terms it does not thereby vary the contract or introduce new terms into it, but declares that certain acts unexplained by the compact

impose certain duties and that the parties had stipulated for their performance. *Ogden* v. *Saunders*, 12 Wheaton, 341–342.

Besides the express language referred to above that the "right to lay down, construct, maintain and operate" its railway was "granted" to plaintiff in error, it appears that in land and money the plaintiff in error paid to the defendant in error over $10,000 (Printed Record, page 43). On the examination of the contract it will appear that not a single thing passed from the city to the plaintiff in error in the way of consideration for this amount of money paid the city, except the right to use the streets. The changes made by the plaintiff in error of its railway line as required by the contract were not made for its benefit, but as expressly stated by that contract for the benefit of the public (Printed Record, pages 21–22, par. 1 of contract; Printed Record, page 24, par. 3 of contract). The plaintiff in error was required at its expense to remove a large amount of trackage from certain streets in the city of Savannah (Printed Record, page 23, par. 2 of contract). The city desired to open Barnard Street and required the plaintiff in error to pay the city the amount necessary for this purpose (Printed Record, pages 24–5, par. V). The plaintiff in error was required to pay one-half of the sum necessary to open Tenth Street (Printed Record, page 25 b). They were required to convey free of cost the land necessary to open Barnard Street (Printed Record, page 25 c). They granted certain land in Bolton Street to enable the city of Savannah to open that street (Printed Record, page 25 d). The city of Savannah by the contract bound the plaintiff in error never to charge more than five cents a fare and to furnish proper transfers at all intersecting points (Printed Record, page 25 f). They granted certain land in Whitaker Street to the city of Savannah to enable the city to open

that street (Printed Record, pages 25–6 g). The city of Savannah required the plaintiff in error at its expense to remove a great number of switches and sidetracks and to pave the streets where such removals were made (Printed Record, page 27, par. first). In each and every one of the above matters the benefits accrued to the city of Savannah and the public and not to the plaintiff in error. What therefore was the consideration which moved the plaintiff in error to go to these large expenses, to grant their land to the city, to assist the city in opening its streets, and to arrange their system of railway to suit the city and the public? The conclusion is irresistible that in view of the express language of the contract as well as by necessary implication, the plaintiff in error was to use these streets free of any further charges for such privilege.

The city having accepted the benefits under the contract with the plaintiff in error,—this ordinance imposing a tax for the privilege of using those streets named in the contract,—impairs the obligations of the same.

Chicago v. *Sheldon*, 9 Wallace, 50.

City of St. Louis v. *Western Union Tel. Co.* 63 Fed. 68.

Iron Mountain R. Co. of Memphis v. *City of Memphis*, 96 Fed. 113.

Mercantile Trust and Deposit Co. v. *Collins Park & B. R. Co.* 101 Fed. 347.

In *Detroit* v. *Detroit Citizens' Street Railway Company* (184 U. S. 368) and in *Cleveland* v. *Cleveland City Railway Company* (194 U. S. 517) it was held that an ordinance of a city council providing for an extension of the tracks of a street railway and fixing the rate of fare constituted a contract and that that contract was impaired in violation of the Constitution of the United States by a subsequent ordinance which undertook to reduce the rate of fare.

These decisions have a direct application to the present case. The ordinances here relied upon constituting the contracts between the plaintiff in error and defendant in error and the subsequent ordinances purporting to be adopted under a continuing legislative authority in the mayor and aldermen of Savannah laying taxes not contemplated by the original ordinances, constitute a violation of the contract.

Fourth Assignment of Error.

"The court erred in refusing to enjoin the enforcement of said tax ordinance upon the ground that it included Whitaker and Bolton streets, the land for which had in part been conveyed to the mayor and aldermen by the railway for the purposes of streets, and at the same time the easement for railroad purposes over said land was expressly reserved to the railway, this being done by contract with the mayor and aldermen, the obligation of which contract the plaintiff contends the ordinance impairs."

We respectfully submit that with regard to the charge put upon the plaintiff in error by this tax for using Bolton and Whitaker streets there can be no question whatsoever as to this ordinance impairing the obligation of the city contained in the contract of 1897. It seems to us that neither authority nor argument is necessary to sustain this contention. The plaintiff in error conveyed to the city the land in portions of these two streets necessary to open these streets, for the benefit of the city and the public, and the contract expressly and specifically reserves to the plaintiff in error the easement of use in such portion for its railway purposes. The language of the contract as to Bolton Street is:

"The said railway company owning certain land in Bolton Street, is to convey to the mayor and aldermen of

the city of Savannah, so as to aid it in opening Bolton Street eastwardly of Savannah, Florida and Western Railway tracks, all of the right, title, interest, and estate of the said Savannah, Thunderbolt and Isle of Hope Railway of Savannah, Georgia, in and to such lands in Bolton Street, preserving, of course, the easement of the said street railway company over said land for its railway purposes." (Printed Record, p. 25, par. *d*.)

The language as to Whitaker Street is:

"The said railway company is to procure from the City and Suburban Railway Company a conveyance to the mayor and aldermen of the city of Savannah, free of cost, of all the right, title, interest and estate of the said last named railway company in and to that portion of Whitaker Street which runs through the City and Suburban Railway stables property, lying between Second and Fourth Streets, preserving, of course, the easement of the said railway company over said land for its railway purposes." (Printed Record, pp. 25, 26, par. *g*.)

There can not be a stronger contract in favor of the plaintiff in error for the reason that the city was not only paid for the privilege granted the plaintiff in error to use these portions of Bolton and Whitaker streets, but the easement of use in such portion was expressly excepted from the grant by the railway.

The exception from the grant to the city of this land of the easement of use left such easement in the plaintiff in error as of his former right or title.

Ashcroft v. *Eastern R. R.* 126 Mass. 196, 198.

The only possible escape from the conclusion that this ordinance impairs the obligation of the contract between the city and the plaintiff in error, in so far as the portions of Bolton and Whitaker streets granted to the city are concerned, is the suggestion that the tax is not imposed for the use of the streets. Our reply to this is that the

language of the ordinance expressly states that the tax is imposed "for the use of the streets," and furthermore, that under its terms the plaintiff in error is not required to pay except for tract "used." It follows that if the plaintiff in error uses a mile of track over the portion of Bolton Street granted to the city, it must pay $100. If they do not use such mile of track, they would pay nothing. No clearer and more certain test than this can be imposed to determine the question as to whether, or not, the tax is imposed for the use of the streets.

This ordinance being void on this ground in so far as it relates to Bolton and Whitaker streets, the entire ordinance is void as it is impossible to separate the illegal portion of the tax from the legal portion—admitting for the sake of argument that it is otherwise legal.

Where a tax assessment includes property not legally assessible and the part of the tax assessed upon the latter property can not be separated from the other part, the entire tax assessment is invalid.

Santa Clara County v. *Southern Pacific R. R.* 118 U. S. 394–415.

California v. *Pacific R. R. Co.* 127 U. S. 1, 29, 45.

Dissenting opinion in *Central Pacific R. R.* v. *California*, 162 U. S. 168 (bottom of page).

Although in these cases the tax involved was a property tax, we respectfully submit that the principle is equally applicable to the tax involved in the case at bar.

No evidence was introduced to show how many miles of Bolton and Whitaker streets were granted to the city, and therefore the record does not disclose how much this tax of $1,000 should be reduced for such portions of Bolton and Whitaker streets used by the plaintiff in error.

The burden is on the taxing power to show that the

illegal portion of the tax can be separated from the legal. This principle is clearly stated by the court in the case, cited above, of *Santa Clara County* v. *Southern Pacific R. R.* on page 415 as follows:

"It was then incumbent upon the plaintiff (the taxing power in that case) by satisfactory evidence to separate that which was illegal from that which was legal—assuming for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enabling the court to render judgment for such amount, if any, as was justly due."

We respectfully submit in view of these authorities that this ordinance is void under this assignment of error.

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